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KELLEY DRYE & WARREN LLP
A LIMITED LIABILITY PARTNERSHIP
1200 19TH STREET, N.W.
SUITE 500
WASHINGTON, D.C. 20036
(202) 955-9600

NEW YORK, NY
TYSONS CORNER, VA
LOS ANGELES, CA
CHICAGO, IL
STAMFORD, CT
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BANGKOK, THAILAND
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TOKYO, JAPAN

FACSIMILE
(202) 955-9792
www.kelleydrye.com

March 4, 2004

ROBERT J. AAMOTH
DIRECT LINE (202) 955-9676
E-MAIL: raamoth@kelleydrye.com

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Room CY-B402
Washington, D.C. 20554

Re: ***Notice of Ex Parte Presentation in CC Docket No. 96-262***

Dear Ms. Dortch:

ITC^DeltaCom Communications Inc., d/b/a ITC^DeltaCom, through its attorneys, hereby submits this notice of *ex parte* presentation in order to ensure that the attached submissions in CC Docket No. 01-92 are placed on the record in the above-referenced rulemaking proceeding.

Please contact me at (202) 955-9676 if you have any questions regarding this filing.

Sincerely,

Robert J. Aamoth

Enclosures

cc: Victoria Schlesinger (via email)
Qualex International (via email)

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JAKARTA, INDONESIA
MUMBAI, INDIA
TOKYO, JAPAN

FACSIMILE
(202) 955-9792
www.kelleydrye.com

February 24, 2004

ROBERT J. AAMOTH
DIRECT LINE (202) 955-9676
E-MAIL: raamoth@kelleydrye.com

BY ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Room CY-B402
Washington, D.C. 20554

Re: ***Notice of Ex Parte Presentation***
Petition of US LEC Corp. for a Declaratory Ruling Regarding LEC Access Charges for CMRS Traffic, CC Docket No. 01-92

Dear Ms. Dortch:

ITC^DeltaCom Communications Inc., d/b/a ITC^DeltaCom, through its attorneys, files this notice of *ex parte* presentation. On February 23, 2004, Jennifer Kashatus and I, counsel to ITC^DeltaCom, and Richard Juhnke of Sprint met with Matthew Brill, Senior Legal Advisor to Commissioner Abernathy, to discuss the above-referenced petition.

During the meeting, ITC^DeltaCom and Sprint urged the Commission to deny US LEC's petition and to apply its ruling fully to the conduct in which US LEC has engaged. ITC^DeltaCom and Sprint underscored that the relevant legal question in this case is not whether the CLEC Benchmark Order prohibited the type of abusive routing practice that US LEC engages in, but whether the CLEC Benchmark Order authorizes US LEC or any other CLEC to charge the benchmark rate for this practice. The benchmark rate did not exist as an FCC-approved rate prior to this decision, and, once created by the FCC, the benchmark rate cannot be used except where and as authorized by the FCC. The CLEC Benchmark Order does not authorize US LEC or any other CLEC to use the benchmark rate for the transit routing of CMRS-originating traffic, and in fact the order and its implementing rule expressly require that the rate reflect all originating access functions. In particular, FCC Rule 61.26(a)(5) requires the benchmark rate to cover ***"all applicable fixed and traffic-sensitive charges"*** (emphasis supplied). Hence, it has never been lawful for US LEC or any other CLEC to use the FCC-approved benchmark rate for the transit routing of CMRS-originating long distance traffic.

In addition, Sprint made the point that sanctioning US LEC's practice would create an uneven playing field between CLECs and ILECs in competing for the handling of originating wireless "8YY" traffic, since CLECs would be able to charge much higher rates than ILECs and give kickbacks to wireless carriers, which ILECs are not allowed to do.

Both parties would like to point out for the record that the Commission previously ruled in *AT&T Corporation v. Business Telecom, Inc.*, 16 FCC Rcd 12312 (2001), that it was unlawful for a CLEC to charge an excessive access rate. In that case, the Commission held (at ¶42) that the CLEC's practice of sharing access revenues with its customers was an indication that the access rate was unlawful, and the Commission correctly applied that ruling on a fully retroactive basis dating back to 1998 even though no pre-existing FCC decision specifically advised the CLEC that its rate might be unlawful. As regards the US LEC petition, the record shows that US LEC has implemented a similar revenue-sharing practice with its CMRS customers, thereby confirming that the access rate it has charged to ITC^DeltaCom, Sprint and other interexchange carriers is unjust and unreasonable in violation of 47 U.S.C. § 201(b). In this case, charging the full benchmark rate for the performance of a mere transit routing function results in a rate that is several orders of magnitude higher than US LEC's underlying costs. US LEC cannot claim protection under the CLEC Benchmark Order because, as the record shows, US LEC's rate does not cover "all applicable fixed and traffic-sensitive charges" as required by FCC Rule 61.26(a)(5).

ITC^DeltaCom and Sprint advised that they have disputed numerous invoices sent by US LEC for the transit routing of CMRS-originating "8YY" traffic and that such invoices now total in the multiple millions of dollars. In the case of ITC^DeltaCom, there is currently more than $3 million in outstanding invoices from US LEC for this unlawful practice. The Commission's ruling should not deliberately or inadvertently give US LEC any openings to initiate or prosecute a litigation strategy against interexchange carriers in an effort to collect such unlawful charges.

The parties discussed whether any ruling by the Commission against US LEC should apply prospectively only. Both ITC^DeltaCom and Sprint urged the Commission to apply its ruling fully to the conduct on hand for reasons stated in previous submissions in this proceeding. The parties underscored that US LEC has charged for services that it does not provide, and that this practice is now and has always been unjust and unreasonable in violation of 47 U.S.C. §201(b).

Please contact me at (202) 955-9676 if you have any questions regarding this filing.

Sincerely,

Robert J. Aamoth

Attachment

cc: Matthew Brill (via email)
Christopher Libertelli (via email)
Scott Bergmann (via email)
Daniel Gonzalez (via email)
Jessica Rosenworcel (via email)
Victoria Schlesinger (via email)
Gregory Vadas (via email)
Qualex International (via email)

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DIRECT LINE (202) 955-9676
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March 2, 2004

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Room CY-B402
Washington, D.C. 20554

Re: ***Notice of Ex Parte Presentation***
Petition of US LEC Corp. for a Declaratory Ruling Regarding LEC Access Charges for CMRS Traffic, CC Docket No. 01-92

Dear Ms. Dortch:

ITC^DeltaCom Communications Inc., d/b/a ITC^DeltaCom, through its attorneys, files this notice of *ex parte* presentation. On March 1, 2004, James Gilmore and I, counsel to ITC^DeltaCom, met with Commissioner Kathleen Abernathy and her Senior Legal Advisor, Matthew Brill, to discuss the above-referenced petition.

During the meeting, ITC^DeltaCom urged the Commission to deny US LEC's petition and to apply its ruling fully to the conduct in which US LEC has engaged. The CLEC Benchmark Order does not authorize US LEC or any other CLEC to use the benchmark rate for the transit routing of CMRS-originating traffic, and in fact the order and its implementing rule expressly require that the rate reflect all originating access functions. FCC Rule 61.26(a)(5) requires the benchmark rate to cover ***"all applicable fixed and traffic-sensitive charges"*** (emphasis supplied). The Commission constructed this rule based on input from the CLEC industry. In particular, the Association of Local Telecommunications Services ("ALTS") proposed a benchmark rate that would ***"include all switching and transport components."*** *See* Comments of ALTS, filed Jan. 11, 2001, CC Docket Nos. 96-262 & 97-146, at p. 5 (emphasis supplied). Hence, the benchmark rate may be used only if the CLEC actually performs all of the functions that are covered by the rate. It has never been lawful for US LEC or any other CLEC to use the FCC-established benchmark rate for the transit routing of CMRS-originating long distance traffic.

ITC^DeltaCom pointed out that the Commission previously ruled in *AT&T Corporation v. Business Telecom, Inc.*, 16 FCC Rcd 12312 (2001), that it was unlawful for a CLEC to charge an excessive interstate access rate. In that case, the Commission held that a CLEC's interstate access charge was unjust and unreasonable in violation of section 201(b), relying in part (at ¶¶ 42, 47) on the CLEC's practice of sharing access revenues with its customers as being evidence that the access rate was excessive. Significantly, the Commission applied that ruling on a fully retroactive basis dating back to 1998 without relying on any agency decision notifying the CLEC that its rate might be unlawful. Further, the fact that some interexchange carriers may have paid the CLEC's excessive access rate did not insulate the rate from full scrutiny under the standards in section 201(b). In this case, US LEC's abusive access charge practice, which also involves the sharing of access revenues with its customer, is an unjust and unreasonable practice in violation of section 201(b), and the Commission's ruling should apply, as in the BTI decision, on a fully retroactive basis to US LEC's activities.

ITC^DeltaCom noted that it is the Commission's well-established practice over many years and in numerous cases to apply any ruling that a rate or practice is unjust and unreasonable in violation of section 201(b) on a fully retroactive basis to the case at hand. The Commission often has issued such rulings in response to formal complaints filed pursuant to section 208. *E.g., Global NAPs, Inc. v. Verizon Communications*, 17 FCC Rcd 4031 (2002) (ILEC interconnection practice); *AT&T Corporation v. Business Telecom, Inc.*, 16 FCC Rcd 12312 (2001) (excessive CLEC access charge); *Total Telecommunications Services, Inc. v. AT&T Corporation*, 16 FCC Rcd 5726 (2001) (sham scheme to inflate access revenues); *Rainbow Programming Holdings, Inc. v. Bell Atlantic-New Jersey, Inc.*, 15 FCC Rcd 11754 (2000) (denial of access to video dialtone system); *The People's Network Incorporated v. American Telephone and Telegraph Company*, 12 FCC Rcd 21081 (1997) (backbilling beyond 120 days). As the Court of Appeals has noted, "insofar as Section 208 authorizes the award of damages or other remedies, it is always 'retroactive' in its application in that it will always be changing the economic consequences of a carrier's prior conduct." *Global NAPs, Inc. v. FCC*, 247 F.3d 252, 259 (D.C. Cir. 2001). A carrier is always on notice that its rates and practices will be judged according to the standards laid out by Congress in sections 201(b) and 202(a).

There is no principled basis for limiting the practice of applying rulings to the case at hand to section 208 complaint proceedings, and in fact the Commission has adhered to this practice in response to petitions for declaratory rulings. *E.g., Himmelman v. MCI Communications Corporation*, 17 FCC Rcd 5504 (2002) (directory assistance practices); *In the Matter of AT&T's Private Payphone Commission Plan*, 3 FCC Rcd 5834 (1992) (bundling of 0+ and 1+ services).

It bears emphasis that the Commission, like courts, will apply a ruling on a prospective basis ***only*** when the ruling represents a "shift from a clear prior policy." *See Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 1993); *see also Tennessee Gas*

Pipeline Co. v. FERC, 606 F.2d 1094, 1115-16 (D.C. Cir. 1979) (retroactive application is impermissible only if the agency changes an explicit past policy). Even if the prior policy was ambiguous, the Commission's practice is to apply a subsequent clarification on a fully retroactive basis to the conduct at hand. *See Global NAPs, Inc. v. Verizon Communications*, 17 FCC Rcd 4031, ¶10 (2002) (declaring Verizon interconnection practice to be in violation of section 201(b) even though consent decree obligation was "ambiguous"). In this case, there is no "clear prior policy" in favor of US LEC's routing and compensation practice – indeed, US LEC has not cited any case in which the Commission has even arguably authorized or approved this practice – and hence the Commission's ruling must be applied on a fully retroactive basis as a matter of law and long-established Commission practice.

A few parties have suggested in the most general terms that some CLECs and CMRS carriers may have engaged in this practice on a *sub rosa* basis prior to the filing of US LEC's petition. None of these parties has identified any details of these arrangements, much less submitted copies of them, on the record in this proceeding. As such, these opaque statements must be discarded as unsupported and self-serving. Further, ITC^DeltaCom was not aware of any such routing and billing practices prior to the discovery of US LEC's scam in 2002. If ITC^DeltaCom paid CLEC invoices containing access charges for wireless-originating traffic, it did not knowingly do so, and would have paid such charges only because the CLEC (as it has been documented that US LEC did) affirmatively concealed the wireless-originating nature of the traffic or disguised its role in transmitting the wireless calls. It bears emphasis that the Commission previously looked into a related issue in CC Docket No. 95-185, and no party informed the Commission of any such practices. In the *Sprint PCS* decision, the Commission made a determination, based on the record in that proceeding, that CMRS carriers recovered their access costs from end users, not from interexchange carriers. The Commission stated: "Until 1998, when Sprint PCS first approached AT&T and other IXCs about payment for terminating access service, all CMRS carriers recovered the cost of terminating long distance calls from their end users, and not from interexchange carriers." *Sprint PCS*, 17 FCC Rcd 13192, 13199 (2002). That holding repudiates any suggestion that this type of abusive routing and compensation practice had become a tacit industry norm.

ITC^DeltaCom advised that it does not have the ability as a technical matter to selectively refuse "8YY" traffic delivered to it by US LEC at the ILEC's access tandem, and that ITC^DeltaCom has disputed numerous invoices sent by US LEC for the transit routing of CMRS-originating "8YY" traffic since mid-2002. Such invoices now total more than $3 million. The Commission's ruling should not deliberately or inadvertently give US LEC any openings to initiate or prosecute a litigation strategy against interexchange carriers in an effort to collect such unlawful charges.

Lastly, ITC^DeltaCom wishes to stress that the current posture of this proceeding does not permit the Commission to issue a decision whereby it determines that US LEC's practice was lawful under pre-existing laws and policies yet will be proscribed on a going-forward basis. This approach would embody the adoption of a new rule by the Commission, which requires a notice-and-comment rulemaking proceeding under Section 553(b) of the Administrative Procedure Act. *See Sprint Corporation v. FCC*, 315 F.3d 369 (D.C. Cir. 2003). In that case, the Court noted that "new rules that work substantive changes in prior regulations are subject to the APA's procedures." 315 F.3d at 374. US LEC's petition for a declaratory ruling, and the Public Notice issued by the Commission, do not satisfy applicable APA requirements. Of course, the Commission need not concern itself with this issue if it finds, as the record shows, that US LEC's practice was contrary to existing Commission precedent as well as the prohibition against unjust and unreasonable practices and rates in section 201(b).

Please contact me at (202) 955-9676 if you have any questions regarding this filing.

Sincerely,

Robert J. Aamoth

cc: Kathleen Abernathy (via email)
Matthew Brill (via email)
Christopher Libertelli (via email)
Scott Bergmann (via email)
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Jessica Rosenworcel (via email)
Victoria Schlesinger (via email)
Gregory Vadas (via email)
Qualex International (via email)